Here we would refer to *Sage* v. *Eicholz*,[4] a case under the U.K. Prevention of Corruption Act, 1906 identical with our Act except that for the word "gratification" in section 4(a) and (b), the U.K. Act had the words "gift or consideration". It is convenient to set out a portion of the headnote before quoting the judgment of Bray J.:

"It was the practice of the Metropolitan Water Board to allow to the owners of house property a deduction from the water rates in respect of such portions of their property as had been empty during the quarter for which the rates were payable. The respondent, the owner of a block of chambers, handed to an agent of the Board a 'claim for empties,' in which he fraudulently represented that portions of the block had been empty for longer periods than was in fact the case, whereby he obtained a larger allowance than he was entitled to. The agent was not aware that the statements in the claim were untrue."

"Held, that the paragraph under which the respondent was summoned is not limited either by the title of the Act or by the context of the two preceding paragraphs to cases in which the defendant acts corruptly, and that neither the corruption or attempted corruption of the agent nor his knowledge of the falsity of the statement was a necessary ingredient in the offence charged."

Bray J. said:

"In this case the respondent called at the office of the Water Board and handed to a man named Fitt, a receiving officer of the Board, a document called a 'claim for empties,' and there was evidence from which the magistrate would be entitled to infer that that document contained a statement which to his knowledge was false and was intended to mislead the Board. The prosecution claimed that that evidence showed an offence under the third paragraph of section 1, sub-section (1), of the Prevention of Corruption Act, 1906. The magistrate without calling on the respondent for his defence ruled that no case had been made out within the section, upon the ground that there was no evidence that the agent had been corrupted or that there had been any attempt to corrupt him. He was of opinion that the operation of the Act was limited to the prevention of the corruption of agents, and he said that he was assisted in arriving at that conclusion by the title of the Act, which is 'An Act for the better Prevention of Corruption.' The question we have to decide is whether his decision was right. If the language of the section is quite clear and unambiguous it would not be right for us to alter its construction by reason of the title of the Act. Let us see what the section says. The first paragraph says: 'If any agent corruptly accepts or obtains' a bribe he commits an offence. It is clear that corruption is a necessary part of that offence. Then the second paragraph says: 'If any person corruptly gives or agrees to give' a bribe to an agent he shall be guilty of an offence. Corruption is necessary there. Then the third paragraph in the statement of the offence created by it contains no reference to corruption. The word 'corruptly' which is used in the first two paragraphs is deliberately omitted from the third. It says: 'If any person knowingly gives to an agent' — and here the magistrate has found that Fitt was an agent — 'any receipt, account, or other document in respect of which the principal is interested' — and it could not be disputed that the claim for empties was a document of that description — 'and which contains any statement which is false ... in any material particular' — there was undoubtedly evidence that it did contain such a statement — 'and which to his knowledge is intended to mislead the principal — there was equally no doubt that it was intended to mislead the Board — he shall be guilty of an offence. As the magistrate had evidence before him of all the facts which go to make up the offence he was wrong in holding that a *prima facie* case had not been made out, and he ought to have called upon the respondent for his answer. He said that in his opinion the word 'his' in the sentence 'which to his knowledge is intended to mislead the principal' had reference only to the agent and not to the giver of the document. In that I think he was wrong. In my opinion the word 'his' refers to each of them according as the one or the other is the party charged. In my view the words of the Act are perfectly clear and unambiguous. The word 'knowingly' is deliberately used in the third paragraph instead of the word 'corruptly,' and 'knowingly' does not necessarily involve any element of corruption. The substitution of the word 'knowingly' was probably made because of the great difficulty of proving corruption, and it was thought advisable in a case of the kind dealt with in that paragraph to make the act an offence whether it was done corruptly or not. Under those circumstances we have no right to restrict the plain meaning of the words merely because the Act is entitled 'An Act for the better Prevention of Corruption'."

In the same case Shearman J. said:

"This is another of those cases in which an attempt is made to cut down the plain meaning of a statute by referring to the preamble or the title. It has happened more than once that a certain abuse has brought a new statute into existence, which has proceeded to deal not only with that particular abuse but also with certain kindred abuses, and it has then been sought to restrict its application to the particular abuse which caused it to be passed."

These certificates were clearly used to claim monetary benefits to which the applicant was not entitled. We would answer the question reserved in the affirmative, and confirm the judgment of the learned judge dismissing the applicant's appeal against conviction and sentence.

Answer in the affirmative.

Appeal dismissed.

Solicitors: *Datuk S. P. Seenivasagam & Co.*

LAU KEE KO & ANOR. v. PAW NGI SIU

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Raja Azlan Shah J.) October 22, 1973]

[Kuching — Federal Court Civil Appeal No. 126 of 1972]

Contract — Building contract — Contract made by father as attorney for his son — Claim for damages for fraudulent misrepresentation — Undisclosed principal — Claim for quantum meruit — Plaintiff must not be at fault.

The appellants had entered into a written agreement with the respondent, a building contractor, to construct and complete terrace houses on land belonging to the son of the first appellant and the second appellant. The first appellant held a power of attorney from his son. The respondent did not complete the construction of the terrace houses within the time stipulated and the appellants formally terminated the agreement. Subsequently the respondent served a writ on the appellants claiming $10,236.00 for work done and materials supplied or alternatively for damages for fraudulent misrepresentation and/or breach of contract. The appellants denied fraud and contended that the respondent knew that appellant No. 1 was holding a power of attorney on behalf of his son. They counterclaimed for the sum of $11,500 which they claimed they had paid to prospective purchasers of the houses. The learned trial judge held that fraud was established but did not make a finding with regard to the alternative claim for work done and materials supplied. He dismissed the counterclaim as he found that the appellants had failed to prove the payment of the compensation. The appellants appealed.

Held, allowing the appeal: (1) in this case the respondent had not shown that any personal considerations had entered into the contract making the fact that as alleged he was led to think that he was contracting with the owner when in point of fact he was contracting with the agent a material element in the contract;

(2) therefore on the facts fraud had not been made out;

(3) the learned trial judge was wrong in holding that there had been a breach of contract by the appellants before they purported to terminate the agreement;

(4) the respondent could not claim on a quantum meruit as the facts showed that he was at fault and had broken the contract;

(5) the learned trial judge was right in holding that the counterclaim had not been proved.

Cases referred to:-

(1) *Derry* v. *Peck* (1889) 14 App. Cas. 337.
(2) *Smith* v. *Wheatcroft* (1878) 9 Ch. 223, 230.
(3) *Nash* v. *Dix* (1898) 78 L.T. 445, 448, 449.
(4) *Gordon* v. *Street* [1899] 2 Q.B. 641, 647.
(5) *Said* v. *Butt* [1920] 3 K.B. 497, 501.
(6) *Haji Hassan* v. *Tan Ah Kian* [1963] M.L.J. 175.
(7) *Roberts* v. *Bary Improvement Commissioners* (1870) L.R. 5 C.P. 310, 326.

FEDERAL COURT.

D. C. C. Tiong for the appellants.

Chong Siew Chiang for the respondent.

Raja Azlan Shah J.: Sibu Lease of State Land No. 57132 is registered in the name of Law Chung Cheong, the son of appellant No. 1 (hereinafter referred to as the son). Appellant No. 2 is the registered owner of Sibu Lease of State Land No. 57133. Her husband is the younger brother of appellant No. 1.

Prior to his departure for studies in Taiwan, the son gave his father, full power and authority, vide power of attorney L. 72000/66 dated 28 December 1966 "to manage and sell or mortgage" his land.

Both the father and appellant No. 2 were desirous of developing the land. So on 17 October 1968 they entered into a written agreement with the respondent, a building contractor of over 10 years standing to construct and complete six units of terrace houses on the two plots of land "within a period of 12 months." The agreement was prepared by a petition-writer. Perhaps unfortunately for the appellants he was not called as a witness. In the agreement appellant No. 1 described himself as the owner of Sibu Lease of State Land No. 57132. Now, clause 1 of the agreement states that the contractor must complete . . . within 12 months . . . . There is no clause to express that time was of the essence. The consideration was that, on completion the appellants undertook to transfer to the respondent four of the said terrace houses together with a cash payment of $6,000. The remaining two units of the terrace houses would be retained by the appellants.

Subsequent to the execution of the said agreement the appellants alleged that they entered into contracts with Tiong Nong Moi (f) and Law Cheng Soon to sell the remaining two units at a price of $26,000 and $25,500 respectively and that they had received $6,000 and $5,500 by way of deposits.

It is common ground that the respondent did not complete constructing the six terrace houses within the time stipulated. That is apparent from the exchange of letters between them. On 26 November 1969 the appellants wrote to the respondent — "We have no alternative but to take over and carry on the above-named work for ourselves." By letter of 16 December 1969 the appellants' solicitors formally terminated the said agreement. It is interesting to note two passages in that letter:

"Our clients instruct us that you had completely stopped working on the said land six (6) months ago and that you had only with the financial assistance of our clients completed the piling work on the said land. Our clients had to buy their own mangrove piles for the two units and they had to provide wages for the labourers working on the four (4) units.

It is pointed out that on the 26th day of November, 1969 our clients had already written a letter notifying you to the effect that they would carry out the required work themselves and hold you responsible for all the damages. Astonishingly, you totally ignored their warning."

The respondent did not rebut the allegation contained in the letter of 16 December 1969. He indicated in his letter of 6 January 1970 to the appellants' solicitors that he would continue with the work. He said thus:

"If weather permits I shall continue on erecting the barrack type of house of Messrs. Lau Kee Ko and another.

Subject to your clients' decision I shall give up erection of the said type of house but in that case I would furnish your clients with a statement of accounts relating to materials and expenses incurred but however I do hope that your clients will still have confidence on me allowing me to complete the said construction of the house.

In passing, I would say that your clients will appreciate with me in view of the present depression as this type of house is not saleable."

To that letter the appellants' solicitors replied on 12 January 1970 "that they had already terminated the above agreement and there is no turning back."

On 11 September 1970 the respondent served a writ on the appellants claiming $10,236.60 for work done and materials supplied, alternatively damages for fraudulent misrepresentation and/or for breach of the said contract, and costs. The appellants in their defence denied fraud. They contended that the respondent "at all material times knew and still knows" that appellant No. 1 was holding a power of attorney on behalf of his son. They further alleged that by June, 1969 the respondent had ceased and had abandoned the work in spite of repeated requests by them to continue with the work, that more than reasonable time was given to him to resume work but all came to nothing, and that thereby he had committed a fundamental breach which went to the root of the whole matter. They counterclaimed for a sum of $11,500 representing compensation to Tiong Nong Moi (f) and Law Cheng Soon, and general damages.

The trial judge found that fraud was established. He did not make a finding with regard to the alternative claim for work done and materials supplied. He directed his mind to the leading case of *Derry* v. *Peek*[1] and held that the respondent had been induced to enter into the agreement by the silence of appellant No. 1 concerning the ownership of the land. The trial judge further held (a) that the respondent had no knowledge that appellant No. 1 was holding a power of attorney on behalf of his son because the title deeds and the power of attorney were neither produced to the respondent for his inspection nor to the petition-writer for the latter to prepare the agreement; and (b) that before the completion date (16 October 1969) appellant No. 1 had taken away the building plans from the respondent (before October 1969) without which he could not proceed with the work, and consequently appellant No. 1, and through him, the appellants were already in breach when they terminated the agreement on November 26, 1969. However, he reserved the

questions of damages and costs pending the outcome of this appeal.

He dismissed the counterclaim because he was satisfied that the appellants had failed to prove that the two sums of money had been given to them by way of compensation.

The appellants appealed. The pivotal point of this appeal is whether fraud was proved. In the course of the lengthy argument before us we have had the benefit of an abundant citation of authority. But I find it unnecessary to refer to more than one or two of the cases cited for the propositions on which the parties relied are in truth elementary.

It is our province now to consider those facts as found by the trial judge and to conclude as a matter of law that fraud was proved. There is inevitably in a case like the present a direct conflict of evidence with regard to the claim. The respondent claimed that the title deeds and the power of attorney were never produced to him for his inspection or to the petition-writer to enable him to prepare the agreement and that the building plans were taken away by appellant No. 1 before completion date. The appellants of course denied it. The learned trial judge who heard and saw the case develop and had the opportunity denied to us of judging the weight of the oral evidence given by the witnesses had no hesitation in preferring the respondent's version and he did not believe the appellants' where they differed from the respondent's.

Assuming the facts arrived at by the learned judge are correct, is that enough to justify a finding of fraud? It is evident from the record that appellant No. 1 had entered into a contract in his own name without disclosing the existence or identity of the principal. In my mind the contract entered into by an agent in similar circumstances is valid. I say this because a power of attorney establishes the relationship of principal and agent as between the donor and donee, and is therefore affected by the law applicable to the law of agency. Now the general law of agency is that when an agent describes himself in the agreement as the owner of a piece of land and signs it in his own name without qualification, he is *prima facie* deemed to be contracting personally and thus personally liable. His principal may also be liable. The third party has to elect to sue both the principal and agent jointly or severally.

If that is the true effect of the law, is there anything to entitle the respondent to avoid a contract made with the appellants? Can it now be said that on those facts alone — those facts relied on by the trial judge — there was fraud. It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

In my opinion what is important in a case like the present is whether consideration of the person with whom the respondent was contracting formed a material element of the contract. If the answer is "yes" then, non-disclosure of the undisclosed principal annuls the contract. That may amount to fraud. The law is laid down by Fry J. (as he then was) in *Smith* v. *Wheatcroft*[2] where he quotes and approves *Pothier, Traite des Obligations* where he says:

> "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract..... On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

That passage has been applied to cases analogous to the present viz., by North J. in *Nash* v. *Dix*,[3] by Smith L.J. in *Gordon* v. *Street*[4] and by McCardie J. in *Said* v. *Butt*.[5]

In the present case the misrepresentation alleged is that the respondent was led to think that he was contracting with the owner when in point of fact he was contracting with the agent. Is that a material element of the contract? I ask myself here whether the respondent has shown that any personal considerations entered into the contract? Has he shown the court that he would have been unwilling to enter into the contract in the same terms with anybody else. I say distinctly that he has failed to produce such an effect on my mind. In my opinion he did not care a straw who he was contracting with, and whether a contract has been made in the name of the appellant No. 1 or of the principal, would not have made the slightest difference to him. Under those circumstances it is all but certain that no personal consideration had entered as an element in the formation of the contract. Speaking for myself, I very gravely doubt whether all those matters, when added together, in the circumstances of this case, amounted to fraud. To put at its highest, the allegation of fraud was of the most tenuous kind.

That is not the end of the matter. Although the trial judge arrived at the view that the respondent did not complete the work in time, he held that appellant No. 1 committed the breach first by taking away the plans from the respondent before the completion date when they purported to terminate the agreement on November 26, 1969. That he concluded would entitle the respondent to damages against the appellants. With respect to the trial judge I think he was wrong. The facts as found by him do not warrant such a conclusion. The trial judge after "having regard to the meagre evidence" found as a fact that the respondent took away the plans before October 1969. Now before October 1969 would only mean during or before September 1969. But in September 1969 the trial judge found that

> "after becoming aware of this fraudulent misrepresentation he carried out minor works at the site; that he tried even to invite Lau Pang Yu to take part in this business venture."

Lau Pang Yu had even gone to the extent of asking appellant No. 1 for the plans. That was also in September 1969. If that is so, it is idle to say now that the appellant No. 1 was in breach. In my opinion, the respondent with full knowledge of the facts, made

it clear by words and acts, that he had waived the breach, the effect of which is that he had preserved the status quo.

Was the respondent himself in breach by not completing the work in time? It is quite obvious that time was not of the essence of the contract. No inference can be drawn that time was of the essence. See *Haji Hassan* v. *Tan Ah Kian.*[6] The appellants thought fit that the respondent was in breach, so they terminated the agreement by their letter of November 26, 1969, which was followed by another letter of December 16, 1969. The respondent pleaded for leniency too late (see his letter of January 6, 1970 indicating willingness to continue work). The appellants replied "there is no turning back." That was the coup de grace.

In the course of the argument it was submitted on behalf of the respondent that if we allow the appeal we should also consider the respondent's claim for work done based on quantum meruit. The trial judge has thought fit not to express any opinion on the matter as he has held that the claim of fraud was substantiated. I now proceed to consider this aspect of the claim.

It is axiomatic that one of the conditions to justify a claim based on quantum meruit is that the plaintiff must not be at fault. This is what the learned author of *Anson's* Law of Contract, 23rd Edn., says at page 529:

"Secondly, the claim must be brought by the party not in default. The party who breaks the contract, even though he may have partially performed some part of his obligation, is not entitled to a quantum meruit for the work which he has done."

It will be sufficient to add one short passage from the well known case of *Roberts* v. *The Bury Improvement Commissioners.*[7] That was also a case of a building contract. Blackburn J. says:

"It is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L); and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damage he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract."

That in my opinion is sufficient to dispose of the claim on quantum meruit against the respondent.

I now come to the appeal on the counterclaim. The trial judge was not able to rely on the evidence adduced by the appellants. He has rejected the evidence of all the witnesses examined by them to prove the fact of deposit and compensation. He further held that the alleged agreements of sale and purchase were not in existence before 1969, otherwise some mention of it would be made in the exchange of letters between the parties in 1969 or early 1970. That conclusion has been criticised. It is said that this finding is not relevant to the issue whether the respondent was liable to pay special damages. Another criticism levelled against the finding of the trial judge was that he had considered matters that were never pleaded. Counsel insisted that beyond flatly denying knowledge of or liability under the two agreements, the appellants did not plead that those agreements were fabricated and not in existence or entered into by them on the two dates.

Now in paragraph 5 of the reply and defence to the counterclaim, the respondent says that he

"does not admit and has no knowledge whatsoever of the alleged two agreements mentioned in the counterclaim until receipt of the defence and counterclaim."

In the face of this averment it cannot be denied that they had pleaded that the agreements were not in existence on those two dates and therefore were a sham. The trial judge doubted the genuineness of the date of execution of the two agreements. That in my opinion is a relevant factor in determining whether the agreements were a sham and consequently whether special damages were proved. A reasonable and prudent man would have mentioned it in the exchange of letters bringing notice to the respondent to complete the contract in time because they had committed themselves to sell the remaining two terrace houses to third parties. In the matter of assessing oral evidence this court as a general rule attaches great value to the opinion formed by the trial judge unless there are special reasons for not doing so. On an assessment of the entire evidence in the case I am in complete agreement with the trial judge that the counterclaim has not been satisfactorily proved.

I would therefore allow the appeal and dismiss the appeal on the counterclaim.

I think with regard to the appeal it must be allowed with costs here and in the court below. Similarly with regard to the counterclaim it must be dismissed with costs here and in the court below.

Azmi L.P. and **Ismail Khan C.J. (Borneo)** concurred.

Appeal allowed.

WOON HOE KAN & SONS SDN. BHD. v. BANDAR RAYA DEVELOPMENTS BHD.

[F.C. (Ong C.J., Ali and Ong Hock Sim F.JJ.) October 31, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 111 of 1972]

Contract — Overdue payment — Interest — Rate of — Contracts (Malay States) Ordinance, 1950, s. 74.

This was an appeal against the decision of the High Court ([1973] 1 M.L.J. 60). The appellants had contracted to carry out certain civil engineering works for the respondents and a sum of $1,190,165.17 was certified as due to them, out of which part payment of $330,000 had been made. There was evidence of the appellant's forbearance to sue for a considerable time in consideration of an agreement to pay interest on overdue payments.

The appellants brought an action to recover the amount due and were given leave to sign final judgment for $860,165.17. Leave to defend was granted as to the claim for interest at the rate of 10.8% and the learned trial judge eventually allowed the claim at 5%. The appellant appealed.

Held, allowing the appeal: on the evidence the parties had agreed on the rate of interest and therefore the order should be for payment at the agreed rate, that is, 10.8% per annum.